

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA

v.

RICHARD DEVLIN,

Defendant

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Criminal No. 96-44-P-H

**RECOMMENDED DECISION ON DEFENDANT'S MOTION
TO EXTEND DEADLINE FOR FILING MOTION FOR COLLATERAL RELIEF
PURSUANT TO 28 U.S.C. § 2255**

The defendant, appearing *pro se*, has filed a letter motion requesting “a one hundred eighty day extension in filing my § 2255.” Letter dated September 1, 1998 (Docket No. 35). This request is based on the fact that post-conviction review of the defendant’s state-court convictions is currently pending in the Maine Superior Court. *Id.* These convictions established the defendant’s status as a career offender under section 4B1.1 of the United States Sentencing Commission Guidelines, increasing his total offense level by 11. Presentence Investigation Report at 8. This increased the sentencing range under the Guidelines from 63-78 months (Offense Level 20, Criminal History Category V) to 188-235 months (Offense Level 31, Criminal History Category VI). United States Sentencing Commission Guidelines Ch. 5, Pt. A. On October 31, 1996 the defendant was sentenced to a term of imprisonment of 188 months. Transcript of Proceedings (Docket No. 31) at 7.

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Pub. L. 104-132, Title I, § 105, 110 Stat. 1220, amended 28 U.S.C. § 2255, which provides a means by which a prisoner in federal custody may seek to vacate, set aside or correct his sentence, to provide that “[a]

1-year period of limitation shall apply to a motion under this section.” The defendant is justifiably concerned that this period will expire before his post-conviction actions in state court have been resolved.¹ The government opposes the request.

Several courts have held that the one-year limit created by AEDPA is not a jurisdictional bar, but rather a statute of limitations subject to equitable tolling. *E.g.*, *Calderon v. United States District Court*, 128 F.3d 1283, 1288 (9th Cir. 1997); *Moore v. Hawley*, 7 F.Supp.2d 901, 904 (E.D.Mich. 1998); *Henderson v. Johnson*, 1 F.Supp.2d 650, 654 (N.D.Tex. 1998). However, that fact means only that a defendant may be allowed to pursue a claim for collateral relief after the limitations period has already run, under certain circumstances. It does not mean that a court has the power to suspend the running of the limitations period before it has expired, based on a defendant’s representation that certain events that may affect his claim have not yet come to completion.

Section 2255, as amended, provides that the limitation period begins to run from one of four events:

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or law of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

¹ The defendant believes that the period expires on October 4, 1998. Letter. The government states that the period ends on January 25, 1999. Government Objection to Motion to Extend Time for Filing § 2255 Petition and Supporting Memorandum of Law (“Government Objection”) (Docket No. 36) at 2.

Without expressing an opinion on the question whether the defendant's attempt to vacate his state convictions would prevent the statute from running on a potential claim that he was improperly sentenced based on the calculation of his criminal history under the United States Sentencing Commission Guidelines, I can and do conclude that the statute does not provide the courts with the power to suspend the running of the statute before the limitations period has expired. The defendant's state-court efforts may ultimately fail, and granting his motion — and the requests for further extensions that would inevitably follow — would give him and all other federal prisoners whose sentences were enhanced by state convictions under the Guidelines a means to avoid Congressional intent as expressed in the one-year limitation period. Even if the courts had the power to do what the defendant requests, therefore, it would not be appropriate as a matter of policy to exercise that power under the circumstances present here.

Accordingly, I recommend that the defendant's request be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 26th day of October, 1998.

*David M. Cohen
United States Magistrate Judge*